RECORD
AND
BRIEF

No. 16-1144

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The government does not dispute that the circuits are openly split about whether the residual clause of 26 U.S.C. § 7212(a) requires that the defendant acted with knowledge of a pending IRS action. BIO 14-15. Nor is there any dispute that this petition squarely presents that question. That is ample reason by itself for this Court to grant review. Whether conduct is punishable as a federal felony cannot depend on whether the prosecution takes place in New York instead of Ohio.

But review is also warranted because the government's interpretation of § 7212(a) is as sweeping as it is wrong. In phrasing notable for both its breadth and its candor, the government contends that the administration of the tax code is "continuous, ubiquitous, and universally known to exist," such that any act or omission taken at any time anywhere could be felonious obstruction. BIO 9. As Petitioner, the dissenting judges below, and *amici* have explained, the government's transformation of § 7212(a) into an all-purpose tax crime frustrates Congress's intent, chills legitimate conduct, and runs afoul of this Court's precedents. This Court has not hesitated to curb executive over-reading of criminal statutes in the past, and its review is needed here.

1. The government concedes, as it must, that the interpretation of § 7212(a) is the subject of a circuit split. The government further identifies no vehicle problems that would prevent the Court from resolving that split in this case.

That leaves the government to argue principally that this Court should deny review because the Sixth

Circuit is the only court of appeals on its side of the split. BIO 14-15.[1] That is no basis for denying review. Even with only one appellate court on one side of the split, it is arbitrary and unfair that the same conduct either is, or is not, a federal felony depending on where a person is prosecuted. That is presumably why in the past two Terms alone the Court has granted ten petitions for certiorari in federal criminal cases in which there was only one court on one side of the split.[2]

The government speculates that the Sixth Circuit could resolve the circuit conflict through *en banc* proceedings. The kind of hypothesizing is no answer given that the same could have been said in each of the ten cases enumerated above, and there is a particularly low likelihood that the Sixth Circuit will revisit *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998). The government claims that the Sixth Circuit has

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[1] As the government noted in its May 25, 2017 letter notifying the Court of supplemental authority, the Fifth Circuit recently sided against the Sixth Circuit on this question, holding that knowledge of a pending IRS action is not required for a violation of § 7212(a). *See United States v. Westbrooks*, No. 16-20490, 2017 WL 2269512 (5th Cir. May 24, 2017). That decision only deepens the circuit conflict.

[2] *See Maslenjak v. United States*, 137 S. Ct. 809 (2017) (4-1 split); *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (5-1 split); *Dean v. United States*, 137 S. Ct. 368 (2016) (4-1 split); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (5-1 split); *Voisine v. United States*, 136 S. Ct. 2272 (2016) (approximately 9-1 split).

"vacillated" in its interpretation of § 7212(a), but the Sixth Circuit recently strongly reaffirmed *Kassouf* while acknowledging that it was solidifying a circuit split in *United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014). Only this Court is positioned to give a uniform construction of § 7212(a).

Finally, the government asserts that the Court previously denied certiorari in four petitions presenting the same question, but those petitions had shortcomings that this petition lacks. In the government's Brief in Opposition to the petition filed in *Sorenson v. United States*, it explained that the question had not been preserved, and any error was likely harmless anyway because the defendant had continued his scheme after he became aware of a pending IRS proceeding. BIO 19-20, *Sorenson v. United States*, No. 15-595, 2016 WL 245461 (U.S. Jan. 20, 2016). Here, there is no waiver and no basis for arguing harmless error.

The other three petitions were submitted before the Sixth Circuit clarified in *Miner* that its interpretation of § 7212(a) conflicts with that of other circuits. *See United States v. Crim*, 451 F. App'x 196 (3d Cir. 2011); *United States v. Wood*, 384 F. App'x 698 (10th Cir. 2010); *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005). In its briefs in opposition to certiorari in those cases, the government argued that *United States v. Bowman*, 173 F.3d 595 (6th Cir. 1999), which the Sixth Circuit decided before *Miner*, had limited *Kassouf* to its facts, and therefore that there was no circuit conflict warranting the Court's review. BIO 11-13, *Crim v. United States*, No. 11-8948 (U.S. Apr. 25, 2012); BIO 10-

11, *Wood v. United States*, No. 10-7419 (U.S. Jan. 11, 2011); BIO 11-12, *Massey v. United States*, No. 05-8633 (U.S. Apr. 12, 2006). Now, in light of *Miner*, the government does not dispute that there is an entrenched conflict.

In short, this petition squarely presents an acknowledged split over whether Congress has made a broad swath of primary conduct illegal. That split warrants this Court's review.

2. The balance of the government's opposition goes to the merits of its position, and it only confirms the importance of this Court's review. As Petitioner, the dissenters below, and *amici* have explained, the government's sweeping interpretation is incorrect, and the dangers it imposes "are neither imaginary nor hyperbolic." Br. of *Amicus* Am. Coll. of Tax Counsel at 3. None of the government's arguments to the contrary is persuasive.

The government unabashedly embraces the Second Circuit's all-encompassing view of § 7212(a)'s residual clause in which *any* act or omission that somehow, someday makes it harder for the IRS to administer the tax laws can form the basis of a § 7212(a) felony charge, if a prosecutor later believes the act or omission was undertaken with "corrupt" intent. Even failing to maintain a receipt or business record years before any IRS inquiry could be a felony in the government's view because the administration of the tax code is "continuous, ubiquitous, and universally known to exist." BIO 9.

The government argues that the sweep of its interpretation is limited by § 7212(a)'s *mens rea*

requirement that the defendant have acted "corruptly." But this Court has repeatedly construed statutes containing similar *mens rea* requirements narrowly. *See United States v. Aguilar*, 515 U.S. 593, 598-600 (1995); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-05 (2005). The government responds that § 7212(a) requires an "exacting" degree of corruption, BIO 11, but the government's definition of corruption—to "act[] with the intent to secure an unlawful advantage or benefit either for [one]self or for another"—is not "exacting" at all. BIO 5. To the contrary as Judge Jacobs explained, such "corrupt" actions are easy to allege. Pet. App. 45a. And as the tax expert *amici* explain, legitimate tax avoidance advice can be easily recast as corrupt obstruction by an aggressive prosecutor who deems the "advantage" that the advice offers to be "unlawful." Br. of *Amicus* Am. Coll. of Tax Counsel 9-11.

The government also argues that its interpretation is mandated by § 7212(a)'s text. But it has no real answer to this Court's decision in *Aguilar*, which construed a similar statute broadly criminalizing obstruction of the "due administration of justice" to impose a "nexus" requirement. The nexus requirement meant that the government had to prove not just any kind of obstruction of justice, but the defendant's particular "intent to influence judicial or grand jury proceedings." 515 U.S. at 599.

The government contends that the phrase "due administration of justice" in *Aguilar* is narrower than the phrase "due administration of the [tax code]," on the theory that the statutory phrase "due

administration of justice" was derived from earlier statutory language that had expressly limited the provision to judicial proceedings. BIO 8-9. But *Aguilar* did not rest on that argument. Instead, the Court invoked the "restraint" it "traditionally exercised . . . in assessing the reach of a federal criminal statute." 515 U.S. at 600. The reality is that when Congress adopted the residual provision that became part of § 7212(a), it gave no hint that it was seeking to create an all-purpose tax felony ready for use any time an act or omission hinders the "continuous" and "ubiquitous" administration of the tax code. BIO 9. The same "restraint" this Court showed in *Aguilar* is called for here.

Congress's carefully crafted scheme of tax crimes makes particularly clear that Congress did not intend such broad construction of § 7212(a). The government acknowledges that any otherwise-misdemeanor willful failure to file a tax return would satisfy the elements of felony obstruction on its reading, but argues that is unproblematic because the government would, in its discretion, not seek a felony conviction for a failure to file a tax return.

That is no answer.[3] Nor for that matter does the government dispute that its reading would allow every count of tax evasion or fraud to be layered with an additional charge of obstruction. The government's

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[3] Indeed, *in this very case* the government charged Marinello with § 7212(a) obstruction based on his failure to file a tax return. The government dropped that charge only after Marinello moved to strike it as duplicative of the misdemeanor failure-to-file count. Pet. App. 7a n.1.

interpretation would thereby "serve[] only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." Pet. App. 46a. The government contends that a broad obstruction statute is necessary to reach corrupt conduct that does not rise to the level of evasion or fraud, but it musters just one case for that proposition. Not only that, the case invoked by the government concerned a defendant who was also convicted for the separate crime of conspiring to defraud the United States under 18 U.S.C. § 371. BIO 14 (citing *United States v. Crim*, 451 F. App'x 196, 200-201 (3d Cir. 2011)). Section 7212(a) does not need to be stretched beyond what Congress intended in order to equip the government to deal with fraudsters.

Finally, the government is wrong when it argues that the Sixth Circuit's construction of § 7212(a)'s residual clause renders the first part of the statute superfluous. BIO 9-10. For one thing, the government has elsewhere taken the position that § 7212(a)'s first clause apparently reaches only *threats* and *forcible* acts aimed at intimidating or impeding federal employees administering the tax code, whereas the residual clause covers "corrupt" acts aimed at obstructing or impeding the administration of the tax code. U.S. Dep't of Justice, Criminal Tax Manual § 17.02 (rev. 2016), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf. Thus, requiring that a defendant undertake a "corrupt" act with knowledge of a pending IRS action in order to convict under § 7212(a)'s residual clause would in no way render the second clause redundant of the first. But even assuming the first clause reaches "corrupt" acts

that endeavor to intimidate or impede a United States officer or employee administering the tax code, B10 10, the residual clause encompasses conduct not covered by the first—such as efforts to collude with an IRS officer to violate the tax laws.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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